

APAAC Fundamentals of Trial Advocacy August 21-25, 2017

CROSS EXAMINATION

How to Prepare for Cross? Be Prepared for Trial!

- Know the case inside and out!
 - Read report over and over, then over again
 - Review pictures, diagrams, 911 calls, medical records, etc.
 - Know the statements of the defendant, victim and witnesses whether written or oral
 - Visit scene if possible (lighting, weather, etc.)

How to Prepare for Cross?

- Know the case inside and out!
 - Speak to your witnesses before trial
 - Anticipate what witnesses responses may be
 - Review witnesses history, priors
 - Prior testimony (trials, orders or injunctions)
 - Check scientific publications, social media sites
 - Pull jail phone recordings

Preparation will give you focus, confidence and the tools you need for an effective cross.

How to Prepare for Cross?

During Trial

- Voir Dire – any possible sympathy for defendant?
- Thorough Direct
- Take the wind out of the defense's sails during direct
- Listen carefully to the testimony of the witnesses

How Else to Prepare?

- Master the Rules!
 - Arizona Rules of Evidence
 - Rule 404(b) Other crimes, wrongs or acts
 - Rule 607 Who may impeach a witness
 - Rules 608 Character for truthfulness
 - 609 Impeachment by criminal conviction
 - Rule 611(b) Scope of cross
 - Rule 611 (c) Leading questions
 - Arizona Rules of Criminal Procedure
 - Rule 19.3(b) Prior inconsistent statements
 - Rule 19.3(c) Prior recorded testimony

Develop Objectives for Cross

- Advance your theory of the case
 - Think of your conclusion, what you want the witness to concede, then work backwards
 - Get concessions on general points, eliciting favorable facts, starting with least contested ones.
 - Don't try to impeach until you finish with concessions
 - Constructive and destructive cross

Demeanor During Cross



*Be mild with the mild; shrewd with the crafty;
confiding with the honest; merciful to the
young, the frail or the fearful; rough to the
ruffian; and a thunderbolt to the liar.*

—Francis L. Wellman

- You need to be flexible and adapt to witness's responses. Keep your emotions in check. It is not the time to argue with the witness.

Leading Questions



- A leading question is one that suggests or contains the answer.
- Avoid using questions that will give the Defendant a chance to ~~weasel-out~~ explain their point

Who?

Or Explain...

What?

When?

Where?

Why?

How?

Why Leading Questions?

- It keeps you in control
- You can use your own words
- It keeps the defendant's answers brief

Avoid Compound Questions

- *Example:* Weren't you upset, as you usually are, when the victim came home after working all day to support you and she was too tired to make dinner right away?
- Break down into smaller questions
 - At the time, you weren't employed
 - You hadn't been employed for four months
 - But the victim was employed
 - She worked from 8am to 6pm
 - She worked at the hospital?
 - You were waiting for her to get home
 - While you waited you were drinking beer
 - You told the officer you had about five beers... etc

One New Fact Per Question

- You will get less objections
- Easier for witness to answer
- Easier to set up impeachment
- Easier for trier of fact to comprehend
 - See Spot
 - See Spot run
 - See Spot run home

Avoid Overuse of "Tag Lines"

- Isn't it true...
- ..., didn't you?
- ..., correct?
- Isn't it a fact...
- Wouldn't you agree...

It will dilute your cross by adding nothing of substance, and will be distracting if used in excess

End on a High Note

- It is good to start and end on a high note
- Primacy and recency
- Do not ask one question too many
- May have tendency to keep asking question when scoring points - avoid the temptation and end strong
- Start with point that was unexpected from defendant's direct, get it out of the way, then move on to planned cross
- OK to start slow, as long as you end strong

You Are in Control!

- Avoid sarcasm or ridiculing the witness on cross
- Don't let the witness give a long, non-responsive answer
- Don't show that you have been hurt by an answer, just move on
- Better for YOU to make conclusions during closing than trying to force the witness to make them during cross

Tips

- Cross examination is a skill that is best learned by practice, failing and succeeding
- The Art of Cross Examination by Francis Wellman
- Irving Younger's Ten Commandments on cross


